RECORD AND BRIEF

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SUPREME COURT, U.S.

Nos. 16-74, 16-86, 16-258

IN THE

Supreme Court of the United States

ADVOCATE HEALTH CARE NETWORK, ET AL., *Petitioners,*

v.

MARIA STAPLETON, ET AL., *Respondents.*

SAINT PETER'S HEALTHCARE SYSTEM, ET AL., *Petitioners,*

v.

LAURENCE KAPLAN, *Respondent.*

DIGNITY HEALTH, ET AL., *Petitioners,*

v.

STARLA ROLLINS, *Respondent.*

On Writs of Certiorari to the Third, Seventh, and Ninth Circuits

REPLY BRIEF FOR PETITIONERS

LISA S. BLATT
Counsel of Record
ELISABETH S. THEODORE
SALLY L. PEI
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
lisa.blatt@apks.com

Counsel for Petitioners
(additional counsel listed on inside cover)

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

AMY L. BLAISDELL
DANIEL J. SCHWARTZ
HEATHER M. MEHTA
GREENSFELDER, HEMKER
& GALE, P.C.
10 South Broadway,
Suite 2000
St. Louis, MO 63102
(314) 241-9090

Counsel for Petitioners
in No. 16-74

JEFFREY J. GREENBAUM
JAMES M. HIRSCHHORN
KATHERINE M. LIEB
SILLS CUMMIS & GROSS P.C.
One Riverfront Plaza
Newark, NJ 07102
(973) 643-7000

Counsel for Petitioners
in No. 16-86

BARRY S. LANDSBERG
HARVEY L. ROCHMAN
JOANNA S. MCCALLUM
MANATT, PHELPS &
PHILLIPS, LLP
11355 West Olympic
Blvd.
Los Angeles, CA 90064
(310) 312-4000

Counsel for Petitioners
in No. 16-258

DAVID L. SHAPIRO
1563 Mass. Ave.
Cambridge, MA 02138
(617) 491-2758

Counsel for Petitioners
in No. 16-258

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REPLY

A church-establishment requirement would serve no purpose other than to irrationally interfere with church governance and discriminate against congregational religions. For the past 37 years, neither the government, churches, nor religious nonprofits thought any such requirement existed. Respondents' charge that reversal would create a "massive new loophole" is thus remarkable. Opp. 1. Advocate and Dignity Health received private letter rulings in the early 1990s. The vast majority of defendants in these lawsuits likewise received their rulings two decades ago *or earlier*. No great calamity has resulted.

But affirmance would unleash a torrent of undesirable results: freezing generous pension benefits; jettisoning settled expectations; reducing funds available to serve the sick and poor; and endless litigation over what a church-establishment requirement means, who established any given plan, and whether religious nonprofits owe billions in retroactive liability for what respondents call "[il]legitimate" (Opp. 1, 53) reliance on the consistent, longstanding views of three federal agencies.

ERISA's text forecloses such a massive upheaval in the status quo. Section 1002(33)(C)(i) eliminates any church-establishment requirement for church-agency plans, and respondents' contrary reading creates glaring, inexplicable surplusage. Sections 1002(33)(C)(i) and (ii) together make clear that church plans can include entirely *non*-church employees and can be maintained *outside* the church. Congress did not illogically require churches to establish such plans.

Like the courts below, respondents ultimately retreat to legislative history, claiming that Congress only intended to permit pension boards to administer church-established, joint plans that covered employees of churches and "closely-tied" church agencies. But the text reaches plans covering *exclusively* employees of church agencies, including hospitals that share "common religious bonds and convictions" but are not under church control. And respondents ignore extensive contrary history indicating that Congress sought to eliminate distinctions between churches and church agencies.

At bottom, respondents view religious nonprofits as unworthy of any ERISA exemption. But their remedy lies with Congress, not with the creation of an extra-textual church-establishment requirement.

A. Text

1. In a case about the meaning of 29 U.S.C. § 1002(33)(C)(i), respondents tellingly lead with something else. Respondents argue, for the first time here, that churches are "deemed the employer" of employees of church-affiliated organizations under § 1002(33)(C)(iii); that a "plan" must be "established or maintained by an employer" under 29 U.S.C. § 1002(1)-(3); and that therefore a plan is not a "plan" unless it is established or maintained by the church. Opp. 18-20.

That cannot be right. Section 1002(33)(C)(iii) deems the church the employer only "[f]or purposes of this paragraph." But the definition of "plan" appears in paragraphs § 1002(1)-(3). The church is *not* the employer for purposes of paragraphs (1)-(3); the actual employers, here religious hospitals, are. Accordingly, a plan is "established ... by an employer,"

§ 1002(1)-(2), when religious nonprofits such as hospitals do the establishing.

Respondents' argument is also circular. The question presented is whether, under § 1002(33)(C)(i), "a plan established and maintained by a church" includes plans that are not actually established by a church. If we are correct that it does, then even under respondents' logic our plans *were* established by a church for purposes of § 1002(1)-(3). After all, if § 1002(33)(C)(iii) somehow applies to § 1002(1)-(3)'s definition of "plan," so must § 1002(33)(C)(i).

Finally, if petitioners' plans are not "plans," ERISA does not apply regardless of any church-establishment requirement, and the Court still must reverse. Recognizing their dilemma, respondents argue (Opp. 20) that petitioners' plans are "plans" under the rest of ERISA—just not under the church-plan exemption. This is incomprehensible. The exemption incorporates the definition of "plan" from the rest of ERISA. § 1002(33)(A) ("The term 'church plan' means a plan ..."). There is no such thing as a "plan" under ERISA but not the church-plan exemption.

2. Respondents' new "it's-only-sometimes-a-plan" argument should not obscure their inability to defend their interpretation of subparagraph C(i). Congress started § 1002(33)(C)(i) by repeating the entire phrase "a plan established and maintained ... by a church" because it intended what followed to substitute for that phrase. Congress had no other reason to employ this definitional approach. Respondents' statement (Opp. 22) that subparagraph C(i) only expands the "maintenance" requirement is pure *ipse dixit*. Repeating and redefining a phrase is a stand-

ard way to signal that the redefinition can substitute for the entire original phrase. Br. 21-23.

Respondents irrelevantly note that *Burgess v. United States*, 553 U.S. 124 (2008), discussed a repeated word rather than a phrase. Opp. 32-33. Its logic applies to phrases as well. *Helvering v. Morgan's, Inc.*, 293 U.S. 121 (1934), makes the same point for phrases. *Helvering* did say that "includes" triggers substitution "if the context requires," Opp. 33, but *Helvering*'s point is that "includes" expands rather than eliminates an original definition. For example, if a plan was actually established and maintained by a church under § 1002(33)(A), the "context" would not require substitution of the alternative definition in § 1002(33)(C)(i). And notwithstanding respondents' contention (Opp. 33-34), *Helvering* substituted the alternative definition. 293 U.S. at 125-26, 130.

Numerous statutes use the term "includes" to modify two requirements connected by the word "and." *Cf.* Opp. 33; *see, e.g.*, 20 U.S.C. § 4402(1); 23 U.S.C. § 101(17); 33 U.S.C. § 426o-2(c); 42 U.S.C. § 3106(b). Respondents cite no actual statute that uses the word "includes" to redefine only half of the preceding phrase. Respondents' interpretation is not even grammatical (Br. 28-29)—a point respondents meet with silence.

Respondents observe that Congress could have eliminated any church-establishment requirement by "deem[ing] a church to have established a pension program that was actually established by a church-associated agency." Opp. 20. But subparagraph C(i) does exactly that: "a plan *established and* maintained by a church ... includes" a plan maintained by a qualifying church-affiliated organization. The tax

code title—"Treatment as Church Plan"—confirms subparagraph C(i)'s deeming function. Br. 24.

3. Respondents' interpretation renders the words "established and" utter surplusage. Br. 24-25. Respondents observe (Opp. 34) that Congress could have enacted a statute that didn't use "established and." This is non-responsive. Respondents also say the canon against superfluity is not unyielding, *id.*, but it is pretty close, and they give no reason to override this venerable canon, U.S. Br. 17.

Respondents incorrectly suggest that our construction nullifies the words "established and." Opp. 34. Those words have meaning for multiple reasons respondents fail to address. Br. 26-27.

4. Respondents also ignore two key textual changes in the 1980 amendment. The original, 1974 text required (1) churches to establish plans covering church-agency employees, and (2) church plans to include church employees. New subparagraph C lacks any express church-establishment requirement, and killed the requirement that any actual church employees participate in a church plan. Br. 27. It is not plausible that Congress nevertheless barred the actual employer of those employees from creating the church plan. And the changes belie respondents' mantra (Opp. 1, 13, 17, 20, 26, 35-38, 40, 43-44) that Congress intended merely to cover church-established plans that included *both* types of employees.

Respondents also ignore Congress's decision to deem all employees of organizations that are "associated" with a church to be church employees. § 1002(33)(C)(ii), (iv). That provision definitively refutes respondents' citation-less theme (Opp. 13, 17,

26, 31 n.15) that Congress confined the exemption to employees of "closely-tied" agencies.

5. Citing hypothetical statutes, respondents argue that Congress surely did not intend to offer healthy Guardsmen disability benefits, or permit 5-year-olds born in Guantanamo Bay to be president. Opp. 22-23. But nothing in the *text* supports such a reading. Br. 29-30. And both hypotheticals involve two independently important but unrelated requirements (disability and veteran; age and birthplace), such that changing one shouldn't affect the other. The opposite is true here. Establishment and maintenance are related; often the same entity does both. And who established a plan lacks independent importance; maintenance is what counts.

Consider hypotheticals more parallel to this case, like a statute providing pension benefits to "any person who is elected to and served in the Senate," later amended to state that a "person who is elected to and served in the Senate includes a person who served in the House." The statute does not condition a House member's eligibility on his election *to the Senate*, just like the church-plan exemption does not condition a church-agency plan's eligibility on its establishment *by a church*. Or consider a statute stating that "an 'aggrieved person' means a person stopped and frisked by the FBI," later amended to state that "a person stopped and frisked by the FBI includes a person frisked by the DEA." Congress did not condition the cause of action on the happenstance that the FBI stopped a person the DEA frisked.

Respondents argue that both the establisher and maintainer are important because the government plan exemption uses "established or maintained," in contrast to subparagraph A's "established and main-

tained." Opp. 23-24, 29. But the question is whether subparagraph C *modifies* subparagraph A. Moreover, the government-plan exemption is inconsistent on "and" versus "or." *Rose v. Long Island R.R. Pension Plan*, 828 F.2d 910, 920 (2d Cir. 1987). *Rose* harmonized the inconsistency by focusing on maintenance, because maintenance mattered "more." *Id.*; Br. 42.

6. Respondents note that subparagraph C(i) requires entities directly maintaining plans to have maintenance as their principal purpose, and argue that subparagraph C(i)'s sole purpose was allowing churches to use "pension boards" to maintain plans churches established. Opp. 21-28. Subparagraph C(i)'s principal-purpose language is a red herring that does not support a church-establishment requirement.

First, our brief does not assume that religious nonprofits can maintain pension plans directly. *Cf.* Opp. 27, 34. They must use internal committees or separate organizations that satisfy subparagraph C(i)'s principal-purpose requirement. Br. 22 n.4. That requirement is not surplusage, but ensures church-affiliation for the entity doing the maintaining, an important function. *Cf.* Opp. 26-27, 34. Rather, because this issue is not part of the question presented, for simplicity we did not repeat "principal purpose" or "otherwise qualifying" every time we referenced church-affiliated organizations. Br. 7.

Second, respondents' argument (Opp. 25) depends on a false premise: that principal-purpose organizations must be external organizations. Subparagraph C(i)'s "or otherwise" language refutes that claim, Br. 22 n.4, a point respondents ignore. Further, Congress acted against the backdrop of the

1977 IRS interpretation, which involved a plan for religious-hospital employees maintained by an *internal* retirement committee. Br. 8.

Employers commonly maintain pension plans through a single-purpose retirement committee, not directly. *E.g.*, *Lockheed Corp. v. Spink*, 517 U.S. 882, 892 (1996); *Romero v. Allstate Ins. Co.*, 2016 WL 6876307, at *2 (E.D. Pa. Nov. 22, 2016) (committee set-ups are "[t]ypical"); Pension Rights Center Br. 24. The same was true in 1980. *E.g.*, *Winer v. Edison Bros. Stores Pension Plan*, 593 F.2d 307, 309-11 (8th Cir. 1979); 40 Fed. Reg. 48,106 (1975) ("plan administrator" may be "a board or committee of trustees appointed by a corporation"). Subparagraph C(i) could not have been intended to forbid this common practice. Rather, subparagraph C(i) ensures that the organizations *directly* maintaining the plan, whether internal or external, are church-affiliated.

There is nothing "inexplicabl[e]" (Opp. 24) about allowing faith-based hospitals to establish plans while requiring maintenance by faith-based internal retirement committees or faith-based outside boards. But it *would* be inexplicable (and contrary to decades of pre-1980 practice) to let pension boards maintain but not establish church plans. Br. 35-38.

Moreover, the *employees* that subparagraph C(i) covers are not the employees of principal-purpose organizations, but the employees of hospitals, schools, orphanages, etc. Subparagraph C(ii) deems the phrase "employee of a church" to include employees of *any* tax-exempt, church-associated entity, and C(i), which uses that phrase, expands the exemption to plans exclusively covering such employees. Requiring churches to establish C(i) plans that exclusively cover the employees of a separate entity over which

the church has no control is entirely illogical in a statute that governs employment benefits. Br. 42-43.

Respondents also argue that, under our interpretation, churches cannot maintain plans they did not establish. Opp. 25. But that is equally true under respondents' interpretation. In any event, Congress addressed the problems it was presented with, and churches have never sought to maintain plans that other entities established. Churches too can use C(i) organizations.

Finally, even were the statute limited to external organizations, that would not support a church-establishment requirement. "Pension board" is not some magical (or even statutory) term, and it is not exclusive to churches. Pension boards are just separately incorporated retirement committees serving churches and church agencies alike. § 1002(33)(C)(i), (iv). If principal-purpose organizations cannot be internal committees, religious nonprofits could just separately incorporate their administering committees. Br. 22 n.4. Respondents do not argue otherwise.

B. Related Provisions

In respondents' view, Congress singled out the YMCA as the *only* church agency that can establish church plans. Opp. 47-48. Respondents do not explain why Congress would have done something so remarkable, or how such a naked preference for one religious entity could be constitutional. Br. 31-32.

The legislative history—which respondents ignore—states the IRS's view that the YMCA plan was in "full compliance" with all the exemption's requirements except possibly a "specific church" requirement. Br. 31. This law assumes that petition-

ers' interpretation is correct, and is thus entitled to great weight. Br. 30.

Respondents offer no reason why Congress treated church- and church-agency-established plans alike in two tax and securities laws but not under ERISA. 26 U.S.C. § 403(b)(9)(B); 15 U.S.C. § 77c(a)(2). Although § 77c(a)(2) exempts certain ERISA plans (Opp. 48), Congress exempted both church- and agency-established plans in the "Church Plan Investment Clarification Act," confirming that Congress regarded agency-established plans as church plans. Br. 32.

C. History

1. The historical context refutes any church-establishment requirement.

a. A driving purpose of the 1980 amendment was reversing the IRS's view that Catholic religious orders could not establish church plans for Catholic hospitals, because those orders were not the "church." Br. 33-35. Respondents do not deny that a church-establishment requirement would resurrect that regime. Their sole response is a footnote claiming that the ruling is irrelevant because "[n]o Member of Congress mentioned [it]." Opp. 42 n.18.

This is flabbergasting. Religious denominations wrote in droves to Congress identifying the "Internal Revenue Service" interpretation as the principal reason for the amendment, and Senator Talmadge entered these letters into the Congressional Record when proposing the bill. 125 Cong. Rec. 10,054-58; Br. 33-35. These same groups prompted him to sponsor the bill. Br. 34-35; JA347; *Hearings Before Subcomm. on Private Pension Plans and Emp.*

Fringe Benefits of Sen. Comm. on Finance, 96th Cong., 1st Sess., 363-64 (1979) ("*Hearings*").

The IRS thought the 1980 amendment rejected its 1977 interpretation distinguishing churches from church agencies. JA638. And while the bill's sponsors did not use the word "IRS," they intended to put church agencies on equal footing with churches, because the former were "part of," and "essential to," the church. Br. 35. Respondents ignore this language. And the sponsors, the amendment's opponents, and religious organizations all repeatedly stated that the amendment would cover "church agency plans," "agency plans," or the equivalent. Br. 38-40 (7 examples). Respondents' suggestion that those terms refer to church-established plans is not credible. Opp. 44-45.

b. Church agencies and pension boards often established plans for church-agency employees. Br. 35-38; U.S. Br. 11, 21-22; Church Alliance Br. 9. Respondents claim that Congress was not "asked to" exempt such plans (Opp. 45), but eventually concede that the Southern Baptists asked for exactly that (Opp. 46; *see* Br. 36). Other denominations offered analogous testimony that respondents cannot persuasively distinguish. Br. 35-36 & n.8; *cf.* Opp. 45-46 & n.20. Representative Conable stated that congregational churches and agencies had "differences in plan provisions," *i.e.*, different plans. 124 Cong. Rec. 12,107.

Respondents assert that "legislators [did not] underst[and] that pension boards established plans for church agencies." Opp. 45. But in addition to the above testimony, Senator Talmadge stated that the bill would eliminate the 1974 exemption's church-establishment requirement. Br. 36-37. In 1980, he

entered into the Congressional Record a Southern Baptist resolution supporting the bill and stating that the board "established" plans for agency employees. 126 Cong. Rec. 12,982.[1] Representative Conable, too, raised concerns about whether a pension board plan "is a plan established ... by a church." 124 Cong. Rec. 12,107. After suggesting that Talmadge "misspoke[]" (Opp. 43), respondents note that the bill-as-introduced expressly authorized qualifying church-affiliated organizations to "establish" exempt plans, while the bill-as-passed eliminated that language. Opp. 43-44. But Congress had to eliminate that language to avoid excluding plans that churches established and principal-purpose organizations maintained; the change *broadened* the exemption. Br. 25-26, 40 & n.9; U.S. Br. 23-24; Church Alliance Br. 18-19.

That the bill once included the word "established" a second time thus does not assist respondents. The bill-as-passed is equally clear and broader—it expressly deems C(i) plans to have been established and maintained by churches. That's why the change went unmentioned. No one suggested that it curtailed the exemption's reach. Talmadge throughout "[w]ork[ed] closely with representatives of 27 major denominations from across the Nation." 126 Cong. Rec. 12,982. Congress did not silently exclude the very plans about which these groups had testified. Nor is it plausible that, when the IRS inter-

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[1] Respondents theorize that Senator Talmadge dropped his objection to the church-establishment requirement because he failed to reference it in his Executive Session remarks when discussing the "final," revised bill. Opp. 44. He was discussing the *as-introduced* bill. JA346 (referencing S.1090).

preted the bill two years later, it somehow missed that Congress had endorsed its 1977 ruling after all.

c. Congress viewed restrictions on the entities that could establish and maintain church plans as discriminatory. Br. 40-42; U.S. Br. 19-21. In their constitutional-avoidance discussion, respondents deny that a church-establishment requirement would cause denominational discrimination. Opp. 62. But they ignore the overwhelming history explaining that the 1974 statute failed to accommodate the use of pension boards by congregational denominations, and the greater autonomy that congregational church agencies enjoyed. 124 Cong. Rec. 12,107.

Respondents repeatedly say without support that Congress intended to permit only the employees of "closely-tied agencies" to participate in church plans. *Supra* pp.5-6. This is demonstrably false: Congress sought to accommodate the congregational churches' *looser* ties to their agencies. Representative Conable explained that "congregational churches have little control over ... agencies," but that the amendments would treat congregational and hierarchical denominations "in the same manner for purposes of the church plan definition." 124 Cong. Rec. 12,107. If churches must establish plans for their agencies, the bill failed to achieve this major goal.

In short, religious organizations, the sponsors, and the government thought the 1980 amendment fixed the gaps and problems of the 1974 law, and avoided a "row with every religious faith in the country." JA347 (Senator Talmadge). It is implausible that all participants in the legislative process thought that church agencies got only half a loaf.

2. Respondents are wrong that Congress intended *only* to preserve an exemption for joint plans that covered both agency and church employees. Opp. 1, 13, 17, 20, 35, 40.

Respondents rely on but materially misquote the title of the original bills containing the 1980 amendment. Respondents represent that the title "expressed the bill's primary purpose 'to permit a church to continue after 1982 to provide benefits for employees of [church-affiliated organizations].'" Opp. 36 (quoting 124 Cong. Rec 10,464, 11,103, 16,518-19; 125 Cong. Rec. 1356, 10,042). Respondents argue from this that Congress merely wanted to "allow[] churches to include agency employees in their plans." Opp. 36-37. But all five cited pages refer to permitting a "church *plan* to continue after 1982 to provide benefits for employees of [church-affiliated organizations]." 124 Cong. Rec 10,464, 11,103, 16,518-19; 125 Cong. Rec. 1356, 10,042 (emphasis added). The titles thus do not assume that "a church" would provide benefits for agency employees.

Respondents also focus on the word "continue," noting that the 1974 statute did not permit standalone church-agency plans. Opp. 36-37. But the bill's title states an additional purpose to "make certain clarifying amendments to the definition of church plan." 124 Cong. Rec 10,464, 11,103, 16,518-19; 125 Cong. Rec. 1356, 10,042. Moreover, these titles referred to the as-introduced version of the bill, which *expressly* authorized non-churches to establish church plans. Opp. 36. So it is more than a little ironic that respondents rely upon those titles and argue that the history nowhere hints that non-churches may establish church plans. *See* Opp. 41 ("no such bill was under consideration"); Opp. 42

("[n]o one suggested"); Opp. 43 ("never ... mentioned").

Expanding the definition was hardly "secondary" (Opp. 39-42); Congress understood that the original definition was too restrictive. Senator Talmadge stated that "the church plan definition is so narrow that it almost completely fails to consider the way our church plans have for decades operated." 125 Cong. Rec. 10,052. As for references to "technical" problems (Opp. 5, 14, 38), it is unclear what respondents think that proves. The church-establishment requirement was a technical problem, and so Congress eliminated it.

Had preserving existing joint plans been Congress's *only* goal, Congress could have just kept the 1974 language and eliminated the sunset. Br. 27. But again, the 1980 amendment permits church plans to cover church-agency employees exclusively. *Supra* pp.5, 8-9. The sponsors' and others' repeated references to "agency plans," Br. 38-40, also refute respondents' notion that "avoiding the division of existing [joint] plans" (Opp. 38) was Congress's sole purpose.

But if it were, that still wouldn't help respondents. As explained, many joint plans were *established by pension boards*, not churches. Br. 35-36. For example, respondents note a Church Alliance representative's statement that, absent an amendment, "all employees of church agencies must be divorced from the church plans." Opp. 39. In the next sentence, he stated that these plans were "create[d]" by the "board." *Joint Hearings Before Subcomm. on Labor and Subcomm. on Private Pension Plans & Emp. Fringe Benefits of Sen. Comms. on Human Re-*

sources and Finance, 95th Cong., 2nd Sess., 916 (1978).

Respondents cite a 1973 committee report referencing examination of a church's "books and records," arguing that this justification does not apply to religious hospitals. Opp. 1, 14, 25-26, 57-58. But legislators offered extensive additional justifications for the 1980 amendment that applied specifically to church agencies, including hospitals. Br. 6, 33-35, 39-42, 61. Further, subparagraph C(i) ensures coverage for missionary organizations and religious orders, among others, for whom a books-and-records concern would be pressing.

Respondents suggest that petitioners' reading of subparagraph C(i) would mean it was "game-changing." Opp. 39. But a "dramatic extension" (Opp. 35) is what everyone understood the bill to be doing and why its opponents objected. *Hearings* 222-23 (bill "substantially expand[s] the concept of church plan"); Br. 38-39 (similar statements). Respondents' claim that the bill was intentionally "modest[]" (Opp. 1, 28), is citation-less.[2]

Respondents argue that a church-establishment requirement means that hospitals would be "naturally" excluded from church plans, "as Congress intended." Opp. 31 n.15, 35, 52-53. But the IRS's 1977 ruling concerned a stand-alone hospital plan. Both sponsors mentioned hospitals. 124 Cong. Rec. 12,107; 125 Cong. Rec. 10,052; *Hearings* 364. Proponents repeatedly offered "hospitals" as a prototypical

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[2] The Court may disregard Professor Daniel Halperin's brief regarding his testimony in 1979/1980. *Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123, 131 n.* (1987) (such statements are entitled to "no weight").

church agency the amendment would cover. *Hearings* 386, 387, 389, 399, 401, 431, 442, 443, 465, 472, 480, 482. Respondents have no explanation for what all these people were talking about.

D. Purpose

A church-establishment requirement is artificial and arbitrary. As all three churches at issue explain, the requirement misconceives how churches and their ministries operate, would interfere with religious autonomy, and would result in denominational discrimination. USCCB Br. 5-23; UCC/ELCA Br. 3-15, 26-30. Such a requirement would resurrect the regime that prompted the amendment. And it would create irrational distinctions between materially identical plans, Br. 46, a point to which respondents have no answer.

A church-establishment requirement would inevitably harm employees by forcing religious nonprofits to abandon their defined-benefit plans. Br. 45. Congress feared this result, Br. 39, 60, and history has borne it out. Respondents' appendix purports to show that "many" secular hospitals offer ERISA-compliant defined-benefit plans. Opp. 54-55. But of the 336 plans they cite, Opp. 67a-89a, a full 267 are terminated or frozen. Defined-benefit plans are rapidly disappearing.

A church-establishment requirement serves no countervailing purpose for plans that churches do not maintain and in which no church employees participate. Br. 42-46. Such a requirement would impose no "ongoing" funding obligation. Opp. 29. The statutory text is pellucid that the maintaining entity can fund the plan. Br. 44. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11-12 (1987),

concerns the definition of "plan," not "establish," and ties funding to "maintain[ing]" a plan, in language respondents do not cite. *Id.* at 12; *cf.* Opp. 29-30.

None of respondents' lower-court cases or statutes (Opp. 30) requires the establishing entity to fund plans; only one case even concerns the definition of "establish." The proposed IRS rulemaking respondents cite (Opp. 31) says nothing about funding. The government confirms that plan-establishers have no funding obligation. U.S. Br. 30-32. This is why Congress did not require church-establishment—it is an empty formalism from the perspective of protecting employees. Br. 42-46. And Congress could not have assumed that church-establishment carries any ongoing funding obligation. If a church establishes a plan and it is thus exempt from ERISA, participants would necessarily resort to varying *state* law upon any default. Ultimately, respondents stunningly ask this Court to impose a church-establishment requirement without reaching "any[] conclusion about [its] precise nature." Opp. 32. Congress surely did not condition church-plan status on such an inchoate requirement, Br. 45-46, and affirmance would unleash a Pandora's Box of unanswered questions.

Respondents and their *amici* identify a handful of failed church plans, citing newspaper reports and unverified allegations in complaints. Br. 7-8; Pensions Rights Center Br. 6-8. The relative scarcity of examples over three decades confirms that church plans generally operate responsibly. *See* UCC/ELCA Br. 31-33. Respondents have no evidence that a church-establishment requirement would have

prevented these shortfalls; at least one of the plans *was* established by a church.[3]

Nor is it plausible that reversal would spur other plans to convert to church plans. Opp. 50. Any entity that wanted to claim church plan status could have done so long ago.[4] Respondents claim that Congress did not want to exempt large employers, Opp. 13, 17, 26, 31 n.15, but neither cite any evidence nor respond to the YMCA's exemption. The text unambiguously includes the employees of large agencies. U.S. Br. 32. And make no mistake: a church-establishment requirement would be devastating to small religious nonprofits too, *e.g.*, USCCB Br. 16-18; No.16-74 Pet. App. 70a-111a, notwithstanding respondents' insertion of the word "giant" in the question presented, Opp. i.

E. Deference

1. For 35 years and on over 550 occasions, three federal agencies have treated plans established by church agencies as church plans. Br. 4, 48-51. The IRS, whose interpretation deserves substantial deference, considered the very same plan before and after the amendment—a plan exactly like petitioners'—and reversed itself in response to the amendment. Br. 50-51.

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[3] http://bigstory.ap.org/article/d6c5bcd340a94e06858c6fd230bb5ec1/puerto-rico-church-strips-teachers-pension-amid-crisis.

[4] Respondents' appendix listing eligible "religious" nonprofits is also error-filled. Opp. 53a-66a. Many are secular. For example, Intermountain Healthcare—#2 on respondents' list—calls itself a "secular not-for-profit organization." Fast Facts, Intermountain Healthcare, https://goo.gl/AGRrii.

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Respondents argue that the agency rulings are "devoid of reasoning." Opp. 50. But the IRS considered both statutory text and history. JA635-38. The IRS did not misread the statute. Respondents attempt to spin the IRS's fleeting reference to maintenance by the church into a statement that churches may directly maintain plans that others established. Opp. 52. The context makes clear that the IRS was discussing the maintenance requirement in isolation. JA636.

Respondents' argument reduces to a complaint that the IRS did not mention each argument that respondents now raise before this Court. But the agency can hardly be faulted for not addressing "anomalies" its interpretation does not create, much less for failing to anticipate every argument respondents make 35 years later. Opp. 24, 51-52; *supra* pp.8-9.

2. Respondents ask the Court to pull the rug from beneath countless religious organizations that structured their benefits plans around the government's interpretation. Years of substantial reliance by an entire industry are reason enough to defer to the agencies' interpretation. *Zenith Radio Corp. v. United States*, 437 U.S. 443, 457-58 (1978).

Respondents charge that reliance here is "[il]legitimate," but acknowledge that taxpayers are entitled to rely on PLRs regarding their own plans' status for tax purposes. Opp. 53. These taxpayers reasonably relied on the rulings for ERISA purposes too. The church-plan exemption is defined in identical terms under ERISA and the tax code; the provisions are closely intertwined; and three agencies have applied a uniform interpretation for decades.

More broadly, respondents' position that any reliance on the agency position was illegitimate reflects their belief that religious nonprofits owe staggering retroactive ERISA penalties. Opp. 53. But respondents later attempt to shift away from this implication, suggesting that petitioners' "good faith"—which must mean reliance—is a complete defense. Opp. 55-56. Respondents cannot have it both ways.[5]

Even if respondents sought no retroactive penalties, the loss of church-plan status would be profoundly destabilizing. The upheaval would deal a severe, possibly fatal, blow to religious nonprofits' ability to continue providing the generous benefits they have offered for decades. Br. 45; UCC/ELCA Br. 31-33. Respondents contend that petitioners have "multiple ERISA-compliant plans," Opp. 7, but most are terminated or frozen, and none are defined-benefit plans, which trigger ERISA's prudent-investment rules and other burdensome requirements.

A church-establishment requirement would have cascading effects across numerous tax and securities law, including serious adverse tax consequences for employees. Br. 52. Respondents claim that the relevant provisions exempt "*all* plans ... that are tax-qualified," Opp. 55, but tax-qualification can depend on church-plan status, 26 U.S.C. §§ 401(a) (flush language), 411(e)(1)(B). Many tax and securities provisions, moreover, do *not* exempt all tax-qualified

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[5] Respondents' allegation (Opp. 54 n.26) that Dignity Health lacks a current PLR is wrong, and respondents profoundly mischaracterize (Opp. 9) statements about Dignity Health's 2012 restructuring, which preserved its Catholic *association*. No.16-258 Pet. Reply 4-5, 10-11; Br. 15 n.3.

plans, just church plans. Church Alliance Cert-Stage Br. 5-11 & n.5; *see, e.g.*, 15 U.S.C. § 78c(g).

F. Ratification

Respondents claim that this Court cannot infer congressional approval of the agency interpretation absent "overwhelming evidence" that Congress was aware of that interpretation. Opp. 49. Respondents' precedents concern congressional failure to act, but here Congress affirmatively acted dozens of times by reenacting or referring to the existing statutory language. In such situations, this Court "presume[s]" that Congress approved existing constructions. *Cottage Sav. Ass'n v. CIR*, 499 U.S. 554, 562 (1991); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).

Regardless, Congress was acutely aware of the IRS's view rejecting a church-establishment requirement because Congress cited that view in passing the YMCA statute. *Supra* pp.9-10. This is unambiguous evidence that Congress approved the executive's interpretation. U.S. Br. 27-29.

G. Constitutional Avoidance

1. Respondents do not dispute that a church-establishment requirement would saddle courts and agencies with the task of distinguishing "churches" from church agencies. Respondents rather claim that drawing those lines would be straightforward. Opp. 61 & n.30. That is hard to square with respondents' denial that Catholic religious orders are the "church," CA9 ER-17 n.2, or with the history. The IRS in 1977 ignited widespread condemnation when it ruled that an order of nuns was not the church because their activities were insufficiently "religious."

Respondents scarcely venture to explain how one could constitutionally decide, for instance, that the Franciscan Sisters who established the Saint Elizabeth Medical Center's plan in 1961 are not a "church." Saint Elizabeth Br. 6-7. The purported "legal tests" that courts and agencies use to draw similar lines in other contexts are unwieldy and of dubious validity. Opp. 61 & n.30; *see Found. of Human Understanding v. United States*, 614 F.3d 1383, 1387-88 (Fed. Cir. 2010) (noting "concerns" about constitutionality of IRS 14-factor test).

Contrary to respondents' contention (Opp. 61-62), determining whether an organization is "controlled by or associated with" a church requires no similarly entangling inquiries. Evaluating whether the organization and the church "share[] common religious bonds and convictions," § 1002(33)(C)(iv), does not involve the scope of the church's mission or the religious nature of an organization's functions.

Respondents ignore the serious intrusion into internal church governance their interpretation entails. As the Catholic Church explains, for instance, church-plan status for Catholic charities, (and, in practice, access to any pension benefits at all) would depend on whether a particular religious charity is housed within a parish or diocese rather than separately incorporated, even though all such organizations are part of the Church as a theological matter. USCCB Br. 10-15. A church would have to centralize the provision of benefits to all those who carry out a church's charitable mission—a monumental task the government has no business commanding the church to undertake.

Respondents argue that Congress may permissibly refuse to extend accommodations for

churches to church agencies. Opp. 60. But whether Congress must extend all religious exemptions to church agencies is another red herring. Br. 57. ERISA's church-plan exemption already extends to the millions of hospital employees at issue here, and to employees of myriad other religious charities. The only question is whether churches must first establish the plans (whatever that means). Such a requirement is constitutionally suspect because it places undue pressure on the definition of church and needlessly interferes in church governance.

Respondents' reading independently discriminates against congregational religions, preventing their ministries from offering church plans to employees in a manner consonant with their religious beliefs. This problem is hardly "abstract" (Opp. 62); many denominations have limited or no access to a central, overarching church (or convention or association of churches) whose function includes establishing pension plans for church-agency employees. Br. 40-42. What synagogue could establish plans for the Jewish Federation of Baltimore? *See* https://www.associated.org/. Worse, for some denominations, including Advocate's, a centralized, hierarchical structure is "anathema" to fundamental religious beliefs. UCC/ELCA Br. 8.

2. Reversal triggers no constitutional doubt. Respondents never explain how a church-establishment requirement for church-agency plans would cure any purported Establishment Clause deficiencies; their arguments render the statute unconstitutional even under their own reading. Br. 61-62.

In any event, the government does not establish religion by leaving it alone. This Court has never

held that failure to regulate a religious organization is an establishment. That employees of exempted organizations do not receive a government benefit does not convert government inaction into an Establishment Clause violation. *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 337-40 & n.15 (1987); Br. 61. Regardless, the status quo would not unconstitutionally harm employees. UCC/ELCA Br. 31-34. Respondents offer no evidence that pension plans established by church agencies fail any more frequently than plans established by churches. Again, ERISA exempts every single employee of every religious hospital in America, even on respondents' interpretation. And respondents are not without protection; state fiduciary laws apply, among others. UCC/ELCA Br. 31.

Respondents fear that religious nonprofits may be advantaged in the "competitive marketplace." Opp. 59. This is ironic; the vast majority of secular hospitals offer inexpensive defined-contribution plans. Br. 9-10. ERISA also exempts the 20 million-plus participants in state and local government plans, including municipal hospital employees.[6] Regardless, religious exemptions are not unconstitutional simply because "secular entities" receive no similar exemption. *Cutter v. Wilkinson*, 544 U.S. 709, 724 (2005).

Respondents ignore hornbook law by suggesting that religious exemptions are constitutionally suspect if they are not constitutionally required. *Id.* at 713-14. And here, exempting religious organizations promotes religious autonomy, avoids entanglement,

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[6] https://www.census.gov/content/dam/Census/library/publications/2016/econ/g15-aspp-sl.pdf

and avoids denominational discrimination. Br. 55-61. Respondents cite no evidence for their claim that equivalent alternatives to religiously objectionable investments are "usually" available. Opp. 57. Nor have petitioners promised in plan documents to invest in violation of their religious beliefs. JA120; JA905; JA377; *cf.* Opp. 57. At bottom, there is nothing constitutionally infirm about letting petitioners continue to offer generous pension benefits to employees, as they have for decades.

CONCLUSION

The judgments below should be reversed.

Respectfully submitted.

AMY L. BLAISDELL
DANIEL J. SCHWARTZ
HEATHER M. MEHTA
GREENSFELDER, HEMKER & GALE, P.C.
10 South Broadway, Suite 2000
St. Louis, MO 63102
(314) 241-9090

JEFFREY J. GREENBAUM
JAMES M. HIRSCHHORN
KATHERINE M. LIEB
SILLS CUMMIS & GROSS P.C.
One Riverfront Plaza
Newark, NJ 07102
(973) 643-7000

LISA S. BLATT
Counsel of Record
ELISABETH S. THEODORE
SALLY L. PEI
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
lisa.blatt@apks.com

BARRY S. LANDSBERG
HARVEY L. ROCHMAN
JOANNA S. MCCALLUM
MANATT, PHELPS & PHILLIPS, LLP
11355 West Olympic Blvd.
Los Angeles, CA 90064
(310) 312-4000

DAVID L. SHAPIRO
1563 Mass. Ave.
Cambridge, MA 02138
(617) 491-2758

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